89-1729

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE

Supreme Court of the United States

October Term, 1989

RONALD TAPP,
Plaintiff/Appellant,

vs.

ANTHONY M. FRANK,
Postmaster General,
Defendant/Appellee.

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I.

Whether the Court of Appeals for the Sixth Circuit failed to properly follow the standards of Anderson v. Bessamer City, 470 U.S. 564, 105 S. Ct. 1504, 84 Law Ed. 2d 518 (1985) when it reversed the decision of the United States District Court for the Western District of Tennessee finding that the Plaintiff/Appellant, had been discriminated against because of his race?

II.

Whether the Court of Appeals misapprehended or misread the findings of the trial court?

PARTIES

The Plaintiff/Appellee in the Court of Appeals was Ronald Tapp.

The Defendant/Appellant was Anthony M. Frank, Postmaster General of the United States Postal Service. (The discriminating official was Mr. Charles Isabell of the Memphis Sectional Center).

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NO.

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October Term, 1989

RONALD TAPP,

Plaintiff/Appellant,

vs.

ANTHONY M. FRANK,
Postmaster General,

Defendant/Appellee.

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Ronald Tapp petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered on January 10, 1990 in case No. 89-5272, in which they reversed a

decision of the United States District Court for the Western District of Tennessee.

OPINIONS BELOW

The opinion in the order of the United States Court of Appeals for the Sixth Circuit entered January 10, 1990 (Exhibit A); the order denying the Petition for Rehearing entered February 7, 1990 (Exhibit B); the oral ruling by the United States District Court, for the Western District of Tennessee of June 15, 1988 is reflected in the findings of fact and conclusions of law in the issues of liability of the Western District of Tennessee, Western Division filed August 11, 1988 (Exhibit C); and the E.E.O. statement of findings dated June 3, 1987 (Exhibit D), all appear in the Appendix to this Petition.

JURISDICTION

The jurisdiction of this court is invoked pursuant to 28 U.S.C. Section 1254 (1) As the opinion below was entered on

January 10, 1990. A Petition for Rehearing was filed by the Appellee and the order denying such a rehearing was filed February 7, 1990 (Exhibit B). Statutory provisions involved Title VII of the Civil Rights Act of 1964, as amended and 42 U.S.C. 1981, 1985 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the Constitution states, in pertinent part:

> No person shall... be deprived of life liberty, or property, without due process of law.

Title 42 U.S.C. Section 1981 states in pertinent part:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory...to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.

Title 42 U.S.C. Section 1985 (3) states, in pertinent part:

> If two or more persons in any State or Territory conspire...for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or equal privileges and immunities under the law...whereby another is injured in his person or property, or deprived of having and exercising any right or privileges of a citizen of the

United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Title 42 U.S.C. Section 2000 (e)-16 states, in pertinent part:

(a) All personnel actions affecting employees or applicants for employment...in the United States Postal Service and the Postal Rate Commission...shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(e) Nothing contained in this Act shall relieve any government agency or official of its or his primary responsibility to assure non-discrimination in employment as required by the Constitution and Statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

STATEMENT OF THE CASE

Plaintiff Ronald Tapp, a disabled veteran, blind in one eye, was an employee of the United States Postal Service as a distribution and mail clerk in Memphis, Tennessee. In 1975, as a result of an audit, Plaintiff was charged with theft from his stamp accountability account. After admitting his error, Plaintiff plead guilty in the United States District Court for the Western District of Tennessee, served time and was placed on probation. On October 30, 1981, Plaintiff wrote the Post Office stating that he had been separated for misappropriation of funds and requesting reinstatement. Plaintiff continued to try and seek reinstatement to a position at the United States Post Office. On March 24, 1982, Defendant sent the Plaintiff a letter instructing him to contact Mr. Isabell, employing agent of the Defendant. The Plaintiff was granted an interview with Mr.

Isabell. Mr. Isabell testified he did not know that Plaintiff had been terminated for cause. The Plaintiff was told by Defendant that he would be considered for any position openings for which he was qualified. On October 20, 1983, Plaintiff received a letter from Defendant stating that his application would be maintained on file for a period of one year and given consideration when vacancies occurred.

On June 20, 1984 Plaintiff was interviewed for a job at the Bulk Mail Center. He was placed on a hiring worksheet but was never considered for an opening and procedural means were used to eliminate him.

On November 26, 1984 Plaintiff again received a letter from Defendant stating that Plaintiff would be considered for any vacancies which would occur during the next year at the Memphis Sectional Center.

Approximately 60% of all employees at the Memphis Sectional Center are black and

approximately 75% of all employees at the Bulk Mail Center are black.

In February, 1985, Plaintiff filed a claim of employment discrimination against the Defendant, which was denied. Plaintiff then filed an action in the United States District Court for the Western District of Tennessee. After a hearing, the United States District Court for the Western District of Tennessee ruled that the Plaintiff had been discriminated against because of his race. Defendant appealed this decision to the U.S. Court of Appeals for the Sixth Circuit. The Court of Appeals reversed the decision of the district court. A Petition for Rehearing was filed and denied and Petitioner is now bringing this Petition for Certiorari.

ARGUMENT FOR THE ALLOWANCE OF THE WRIT

Petitioner believes that the Court of Appeals has so far departed from the acceptable and usual course of judicial proceedings in its reversal of the United States District Court for the Western District of Tennessee, that this Honorable Court should exercise its power of supervision.

QUESTION I.

The Court of Appeals has substituted its judgment for that of the District Court, which is in conflict with this court's decision in Anderson v. Bessamer City, id. 470 U.S. 564, 105 S.Ct. 1504 84 Law Ed. 2d 518 (1985). After a bench trial, the United States District Court for the Western District of Tennessee, ruled that the Plaintiff, a white male had been discriminated against by the Defendant. The court found that the case should be divided

into two sections. The first dealt with the discrimination at the Bulk Mail Center, and the second with the Memphis Sectional Center, both of which are operated by the Defendant. The court felt that the Plaintiff had made out a prima facie case of discrimination. Plaintiff, a white male, was a member of a minority group for employment purposes at both the Bulk Mail Center and the Memphis Sectional Center of the Postal Service in Memphis, Tennessee. Plaintiff had been terminated for misappropriation of funds but had applied for reinstatement. He was interviewed for positions for which he was qualified and was in effect rejected and the position for which he interviewed remained open. The court examined the behavior of the Defendant regarding both the Bulk Main Center and the Memphis Sectional Center. The court felt that the Bulk Mail Center articulated an ostensibly legitimate non-discriminatory reason for refusing to hire the Plaintiff.

The court further felt that the failure to hire by the Bulk Mail Center did not have racial animus.

However, when the court looked at the behavior of the Defendant at the Memphis Sectional Center, the court felt that the reason articulated by the Defendant for not rehiring was merely pretextual. The court compared the activities of the Defendant regarding the Plaintiff with that of a black employee by the name of T. L. Davis. Both Mr. Davis and the Plaintiff are recovering alcoholics and both had been dismissed after stealing money from the Defendant. However, the black male was allowed to be reinstated while the white male was denied such privilege.

The Sixth Circuit Court of Appeals felt that Mr. Davis was not similarly situated to the Petitioner. They accepted at face value the Defendant's argument that Mr. Davis was reinstated at the Union 's behest,

immediately after his removal. The Court of Appeals then substituted its conclusion for that of the District Court and felt that Mr. Davis was not similarly situated to the Plaintiff. However,there is more than sufficient evidence for the District Court to conclude that Mr. Davis was similarly situated to the Plaintiff. The fact that Mr. Davis was in a union is not in and of itself sufficient to say that they were not similarly situated. Further, the request by Mr. Davis to be reinstated was not the result of an agreement or union representation. It was after he had been terminated and had gone through a treatment rehabilitation that the Defendant reinstated him. Further, the union representative admitted that they did not get Mr. Davis reinstated to the Post Office. Thus, it can be seen from the testimony of the union representative and the Defendant that Mr. Davis' reinstatement had nothing to do with the fact that he was

represented by a union. Rather, the Defendant decided that the black male should be reinstated because he had gone through an alcoholic rehabilitation program. The same compassion should have been applied to the white male who had also successfully completed alcohol rehabilitation but it was not done.

The Court of Appeals also stated that Mr. Davis' "immediate" decision to seek reinstatement, to admit his theft was cause by alcoholism and agree to undergo treatment for the alcoholism, differs from Tapp's reappearance six years later. However, once again, these are distinctions without a difference. Both Mr. Davis and the Plaintiff immediately admitted their theft. (It should also be noted that Mr. Davis stole a far larger amount of money than was involved with Mr. Tapp.) Further, the Plaintiff did undergo treatment for his alcoholism and served time in prison (Davis wasn't even

prosecuted) . Upon completing his sentence, probation and treatment he then applied for reinstatement. Davis had already been reinstated when Tapp applied.

There is also other evidence that supports race discrimination. Two other postal employees, Messrs. LaBarre and Heinz also were disciplined for theft. The white male initially received a far more severe punishment than was given the black male. It was only after such inequity was brought to the attention of the Post Office, that the white male's treatment was reduced to equal that of the black male admitted by the Postal Service to avoid disparate treatment and race discrimination.

It is Plaintiff's contention that not only are facts available to back the findings of the trial judge which certainly do not make his findings clearly erroneous but the evidence overwhelmingly supports the decision of the District Court. The trial judge found

the discriminating official, Mr. Charles Isabell, lied to or intentionally deceived Mr. Tapp at four (4) different times (Exhibit C, paragraph 8, 10, 15 and 21). He also found the method of reinstatement was random and arbitrary (Exhibit C, paragraph 11). These are findings of fact by the trial judge which are inconsistent and incompatible with the Court of Appeals Ruling. Daniels v. Board of Education of Ravenna City Schools, 805 F.2d 203 (6th Cir. 1986). The Court of Appeals, without the opportunity to observe the witnesses or their demeanor, or to judge their creditability, has substituted its judgment and version of the facts for that of the District Court. Such a decision is contrary to what was held by the Supreme Court in Anderson v. Bessamer City. The Court of Appeals has referred to this as a reverse discrimination case. However, Title VII prohibits discrimination against white males in the same manner as it prohibits

discriminations against members of a racial minority. McDonald v. Santa Fe Trail Transportation Company, 427 U.S. 273 96 S. Ct. 2574 49 L. Ed 2d 493 (1976). The trial court, having reviewed the evidence, decided that the fact that Mr. Davis, the comparable black employee, was in the union was merely pretextual. Such a finding of fact should not be overruled when there is more than sufficient evidence to sustain it. The most incredible part of the ruling at the Court of Appeals is contra to the trial court's finding of fact that Tapp was never given a reason he was not reinstated by Isabell nor as the trial record will bear out, even told by the Memphis Sectional Center he was rejected and the positions remained open. Mr. Isabell did not follow postal procedures with respect to Mr. Tapp, and in fact, used letters as a subterfuge to delay Plaintiff from learning he was not going to be hired. (Exhibit C, pp. A9, A11). He was never

officially rejected because this would have activated a number of safeguards in postal regulations to prevent exactly what happened.

Further, the fact that the hiring method was totally capricious and arbitrary, indeed they were compared to a lottery by the Defendant, indicates that the trial court was correct to pay particularly close scrutiny to that method to insure that it was not used as a form of racial discrimination. The court felt that the evidence did show, however, that this was indeed a method of insuring racial discrimination.

QUESTION II.

THE DISTRICT COURT DID NOT FIND THAT THE POSTAL SERVICE HAD SUCCESSFULLY PROFFERED A NON-DISCRIMINATORY REASON FOR NOT REINSTATING TAPP.

If the "Findings of Fact and Conclusions of Law on the Issues of Liability" by the trial judge (Exhibit C) is read carefully it is seen that the findings of an "articulated"

reason was as to the Bulk Mail Center only which is not the portion on appeal. The judge found as to the Memphis Sectional Center (which is the portion before this Court) that "...whereas in truth and fact, the Plaintiff was never considered for reinstatement during that time frame." With all due respect it is sincerely urged that the Court of Appeals has misapprehended the findings of the trial court and confused the Memphis Sectional Center with the Bulk Mail Center. When they stated "The district court also held that the Postal Service had successfully proffered a non-discriminatory reason for not reinstating Tapp...". Again, this is not what the trial court found in its decision. It found that the "Bulk Main Center" had given a reason, but the "Memphis Sectional Center" gave no reason at all.

CONCLUSION

For these reasons the Appellant believes that this Honorable Court should grant the Petition for Certiorari and give guidance to the Postal Service that they must follow their own regulations, treat people of all races consistently, not lie to or deceive them, but most importantly issue clear mandate that Union members do not have more civil rights than those unsupported by a union, consistent with 42 U.S.C. 1981 and 42 U.S.C. 1985 (3), by reversing the decision of the Court of Appeals.

Respectfully submitted,

RONALD TAPP

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Counsel of Record for
Plaintiff/Appellant

CERTIFICATE OF SERVICE

I hereby certify that copies of the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit on behalf of Ronald Tapp were served on this 5th day of May, 1990, on the following counsels of record, by first class mail, postage prepaid.

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Asa H. Hoke, Counsel of Record

APPENDIX

EXHIBIT A

Decision of the United States Court
of Appeals for the Sixth Circuit
(Decided and Filed January 10, 1990)

No. 89-5272
United States Court of Appeals
For the Sixth Circuit

RONALD TAPP,
Plaintiff/Appellee,

vs.

ANTHONY M. FRANK,
Postmaster General, U.S.
Postal Service
Defendant/Appellent.

On Appeal from the United States
District Court for the Western
District of Tennessee

Before: MARTIN, JONES, and GUY, Circuit Judges.

PER CURIAM. The Postmaster General appeals the district court's decision in favor of Ronald Tapp after a bench trial in this reverse discrimination action under Title VII and 42 U.S.C.§ § 1981, 1985. For the reasons stated below, we reverse.

In 1970, Tapp, a white male and a disabled veteran, was hired by the Postal Service. In 1975, Tapp resigned at the

request of the Postal Service because he had stolen Postal Service funds. Tapp pled guilty to the theft and was sentenced to thirty-five months probation.

Several years later, Tapp sought reinstatement with the Postal Service at the Memphis Sectional Center three times--on October 31, 1981, on March 12, 1982, and on August 10, 1983, and was rebuffed each time. Charles Isabel, a black male, who was Manager of Employee Relations at the Memphis Sectional Center, made the reinstatement decisions regarding Tapp.[1]

T.L. Davis, a black male, also was terminated for theft on March 24, 1978. Unlike Tapp, Davis pursued reinstatement immediately with the support of the union. The Postal Service reinstated Davis on December 2, 1978. Both Davis and Tapp are alcoholics.

After unsuccessfully seeking a finding of race discrimination from the Equal Employment Opportunity Commission, Tapp sued in district court. After a bench trial, the district court held that Tapp had made out a *prima facie* case of discrimination under the rule of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). The district court also held

1 After Tapp had been denied reinstatement for the third time, Isabel referred him to the Postal Service's Bulk Mail Center for possible employment. This referral proved fruitless for Tapp. Tapp unsuccessfully challenged the failure to hire him at the Bulk Mail Center at trial, but he has not appealed it.

that the Postal Service had successfully proffered a nondiscriminatory reason for not reinstating Tapp -- that he had stolen money during his previous employment. *See id.* The district court found that this nondiscriminatory reason was a mere pretext for race discrimination, because the Postal Service had treated Tapp differently from Davis, a similarly situated black former employee. Thus, the district court held that Tapp had been subjected to disparate treatment.

On appeal, the Postal Service argues that the district court erred in finding that Tapp successfully had rebutted its nondiscriminatory reason for not reinstating him. Once the Postal Service proffers a nondiscriminatory reason for why he was not reinstated, Tapp bears the burden to show that it was a mere pretext. *Id.; Daniels v. Cleveland Bd. of Educ.*, 805 F.2d 203 (6th Cir. 1986).

The crux of the Postal Service's argument on appeal is that Davis was not similarly situated to Tapp, and that no other evidence supports an inference of discrimination. The Postal Service argues that Davis was reinstated at the Union's behest, immediately after his removal, after agreeing to enter the Post Office's alcohol rehabilitation program. In contrast, Tapp did not apply to be reinstated for six years and the Union never advocated that he be reinstated. We agree with the trial court that union advocacy can play a large role

in a reinstatement decision. It may not be fair that Davis had union support and Tapp did not, but there is no evidence to suggest that the lack of union support was due to race or that the Postal Service played any role in preventing union support. Also, Davis's immediate decision to seek reinstatement, to admit that his theft was caused by alcoholism, and to agree to undergo treatment for the alcoholism, differs from Tapp's reappearance six years later. Tapp and Davis are not similarly situated.

Other evidence does not justify a finding of race discrimination. Tapp introduced evidence of disparate treatment by the Postal Service in another pair of applicants for reinstatment, LaBarre and Heinz. Although the district court properly considered LaBarre and Heinz as general background evidence, they are not similarly situated to Tapp. They cannot form basis of a findings of disparate treatment. Tapp also introduced evidence that blacks outnumbered whites at the Memphis Sectional Center, but Tapp made no claim of disparate impact. Indeed, the Memphis Sectional Center actively sought to increase the number of white employees during the relevant time period.

We find that the district court erred in finding that Davis was similarly situated to Tapp. Because no other evidence justifies a finding of discrimination, Tapp has failed to rebut

the Postal Service's nondiscriminatory reason. The judgment of the district court is reversed and this case is remanded with instructions to enter judgment in favor of the Postal Service.

MANDATED ISSUED: 2/20/90

COSTS TAXED: NONE

EXHIBIT B

United States Court of Appeals
for the Sixth Circuit
(Filed and Entered February 7, 1990)

No. 89-5272
United States Court of Appeals
For the Sixth Circuit

RONALD TAPP,
Plaintiff/Appellee,

vs.

ANTHONY M. FRANK,
Postmaster General, U.S.
Postal Service
Defendant/Appellent.

ORDER DENYING PETITION
FOR REHEARING

Before: MARTIN, JONES, and GUY, Circuit Judges.

Upon consideration of the petition for rehearing filed herein by the appellee, the Court concludes that the issues raised were fully considered upon the original submission and decision of this case.

IT IS THEREFORE ORDERED that the petition for rehearing be and it hereby is denied.

ENTERED BY ORDER OF THE COURT

EXHIBIT C

United States District Court
Western District of Tennessee
Western Division
(Filed August 11, 1988)

RONALD TAPP, *Plaintiff*	)	**Civil Action** No. 87-2527-4B
vs.	)	Findings of fact and conclusions of law on the issues of liability
ANTHONY M. FRANK, Postmaster General, U.S. *Defendant*	)	

This cause came to be heard in a bench trial before Senior Judge Robert M. McRae. Pursuant to Rule 52 of the Federal Rules of Civil Procedure, the Court hereby makes the following findings of fact and conclusions of law on the issues of liability.

FINDINGS OF FACT

1. This is an action by plaintiff Ronald Tapp under Title VII of the Civil Rights Acts of 1964 as amended.

2. Plaintiff is a white male who was employed in 1970 by the United States Postal Service presently headed by Anthony M. Frank, hereinafter referred to as defendant.

Plaintiff is a recovering alcoholic. In 1975, he was requested to resign and did resign for misappropriation. On October 31, 1981, on March 12, 1982, and again on August 10, 1983, plaintiff requested reinstatement into the postal service, and his reinstatement was never authorized.

3. Mr. T.L. Davis is a black male who was an employee of the defendant who was terminated on March 24, 1978, for theft and reinstated to another position in the postal service on December 2, 1978. He was also an alcoholic who sought rehabilitation after his termination.

4. Mr. T. L. Davis was the only comparable employee to the plaintiff in that both were terminated for theft, and both were alcoholics.

5. Mr. Charles Isabel, a black male, was an employee of the postal service where he had been in the EEO Office for a number of years until early 1978 when he was then transferred to the Labor Relations Department of the postal service in Memphis, Tennessee. At all times relevant hereto, he worked at the Memphis Sectional Center.

6. Mr. Tommy Nix, a white male, was an employee of the defendant who at all times relevant hereto worked at the

Bulk Mail Center.

7. On March 24, 1982, Mr. Isabel wrote a letter to the plaintiff on behalf of the acting postmaster which granted plaintiff an interview for reinstatement.

8. Mr. Isabel conducted the interview with plaintiff as a sham. The testimony was clear that this was not a real interview. Mr. Isabel only went through its motions because his superior had told him to do so. It was a meaningless gesture, and Mr. Isabel never intended for the plaintiff to be considered for reinstatement for his former job or another job with the postal service.

9. At the time of the interview, Mr. Isabel knew that the plaintiff had stolen from the post office.

10. On October 10, 1983, another letter was sent from Mr. Isabel telling the plaintiff that he would be considered with others for reinstatement for a period of one year. The statement that plaintiff would be considered for a period of one year was a falsehood and known to Mr. Isabel as a falsehood.

11. The method of reinstatement of former employees at the postal service was random and arbitrary.

12. Mr. Isabel became aware that the plaintiff was white in the April 1982 interview.

13. On April 6, 1984, plaintiff's name was entered on the hiring register for the position of Mail Handler at the Memphis Sectional Center and the Memphis Bulk Mail Center, separate parts of the defendant operation in Memphis, Tennessee.

14. On May 16, 1984, the plaintiff's name was entered on a hiring sheet.

15. Mr. Isabel suggested to plaintiff that he might have some hope of being hired by the post office if he went into a new trade or craft. Mr. Isabel knew that that was not true and that there was no hope of the plaintiff's being hired. Mr. Isabel then referred plaintiff to Mr. Tommy Nix of the Bulk Mail Center for an interview.

16. Mr. Tapp interviewed with Mr. Tommy Nix of the Bulk Mail Center on June 20, 1984. Mr. Nix knew at the time that he had no intention of hiring the plaintiff. He stated that nobody should be hired who had stolen from the post office regardless of merit or anything; however, Mr. Nix had this uncompromising attitude toward white and black employees alike.

17. The June 20, 1984 interview of plaintiff by Mr. Nix was meaningless and in many ways was a cruel exercise in futility.

18. On June 21, 1984, plaintiff was closed out on the hiring worksheet.

19. On October 5, 1984, plaintiff was placed on another hiring worksheet.

20. On October 12, 1984, Mr. Nix wrote Ms. Tucker, another employee of the postal service, instructing her to remove plaintiff's name from the hiring register unless the Memphis Sectional Center wished to keep him on.

21. On November 26, 1984, Mr. Isabel again wrote the plaintiff saying that he would be considered for reinstatement. At the time of the letter, Mr. Isabel again knew that the letter was a lie.

22. Plaintiff made a complaint with the EEOC because the postal service had done for Mr. T.L. Davis what they would not do for plaintiff.

23. The plaintiff was never given a reason why he was not reinstated at the Memphis Sectional Center.

24. The plaintiff was never considered for reinstatement by any department of the postal service in Memphis, Tennessee.

25. On November 9, 1982, Mr. Charters sent a memorandum which confirmed the practice followed by Mr. Nix to avoid a technical "passover," which requires justifica-

tion for not hiring an applicant. This procedure is called the Rule of Three. The procedure allows the service to fail to hire or reinstate someone in competition with others without committing a "passover." If the person is not hired three times under this procedure, the applicant is permanently rejected, but he is not given a notice of the rejection. The plaintiff ostensibly was rejected from the Bulk Mail Center because of the Rule of Three, but this was not due to his race.

26. Race was a factor in plaintiff's not being reinstated at the Memphis Section Center. At all times relevant hereto, the black employees were in a substantial majority in the work force at the Bulk Mail Center and the Memphis Sectional Center. The postal establishment in this community has emphasized the rights of black applicants and employees to the extent that white have become a minority in the work force at the postal service in Memphis, Tennessee.

CONCLUSION OF LAW

Plaintiff has made out a prima facie case of discrimination on the basis of his race for failure to hire after termination. Plaintiff, as a white person, was a member of a minority group for employment purposes at the Bulk Mail Center and the Memphis Sectional Center of the postal

service in Memphis, Tennessee. After he was terminated for misappropriation, he applied for reinstatement as an employee of the postal service at both the Bulk Mail Center and the Memphis Sectional Center. He was interviewed for positions for which he was qualified; he was rejected, and the positions for which he was interviewed remained open for hiring.

The defendent articulated an ostensibly legitimate non-discriminatory reason for not hiring or reinstating the plaintiff at the Bulk Mail Center, namely the Rule of Three; however, that failure to hire did not have racial animus. Therefore the plaintiff does not prevail with regard to his claim against the defendant for failure to hire him after termination at the Bulk Mail Center.

With regard to the failure to hire the plaintiff at the Memphis Sectional Center, the reason articulated by the defendant for not rehiring is included in the contention of the defendant as set forth in the Pretrial Order as "based upon applicable postal regulations and upon a review of the merits of plaintiff's situation as a former employee discharged for misappropriation." At trial, the attorneys for the defendant advocated that the plaintiff was not hired after reconsideration from April 1982, through November 1985, whereas in truth and fact, the plaintiff was never considered for rein

statement during that time frame. The interview given by Mr. Isabel in April 1982, and the letters sent by Mr. Isabel to the plaintiff on October 20, 1983, and November 26, 1984, saying that the plaintiff would be reconsidered were in fact subterfuge for delaying the plaintiff from learning that he was not being hired. Race of the plaintiff was a factor in his not going to be hired based upon the conduct of the defendant acting primarily through Mr. Isabel. The only other comparable employee at the Memphis Sectional Center to the plaintiff was Mr. T.L. Davis who was terminated for misappropriation on March 24, 1978, and who was reinstated on December 2, 1978. Mr. Isabel had been in the EEO office of the defendant until early 1978 when he was transferred to Labor Relations where he was located when Mr. Davis was reinstated. The plaintiff made his first request for reinstatement on October 31, 1981. Therefore the Court concludes that the plaintiff has established liability on the part of the defendant for violation of Title VII of the Civil Rights Act of 1964.

This case was ordered bifurcated so that the issue of damages would not be tried at the time that the issue of liability was tried. In the Pretrial Order and at the end of the trial, the Court directed the attorneys for the parties to proceed with preparation for either stipulated facts on the

relief issues or such preparation by discovery so that a report could be had by the end of August to advise the Court what further hearings would be necessary. Based upon contents of the Proposed Findings of Fact and Conclusions of Law, apparently the attorneys have failed to follow that direction of the Court. Counsel for the plaintiff automatically provided for a reference to the magistrate to determine damages, and counsel for the defendant undertook to argue the commencement date for damages. Within fifteen days from the date hereof, the Court wishes to have a report from one attorney for each party setting forth what efforts have been made to stipulate facts for the determination of relief and what other preparations will be necessary before a hearing can be had on the relief issues.

No judgement will be entered on the conclusion of liability until the findings and conclusions of the Court are filed on the relief matters.

ALL OF THE ABOVE IS SO ORDERED.

ENTER: This 11th day of August, 1988.

/s/_____

Robert M. McRae

Senior United States District Judge

EXHIBIT D

Equal Employment Opportunity Commission
Memphis District Office
1407 Union Avenue, Suite 502
Memphis, Tennessee 38104

RONALD TAPP,	)	
Complainant	)	**Docket No:**
	)	043-85-X0121
vs.	)	
	)	**Postal No:**
U.S. Postal Service	)	3-1-2249-5
Agency	)	
Defendant	)	

CERTIFICATION OF RECORD

TO THE AGENCY:

I HEREBY CERTIFY:

1. That the following constitutes the record of the hearing in this proceeding:

(1) The Court Reporter's transcript of the hearing held on March 2, 1987, consisting of an original and 3 copies, numbering 147 pages.

(2) There were no exhibits admitted into evidence.

(4) The Examiner's Recommended Decision in this proceeding.

Date: June 6, 1987

/s/_____
Wendall E. Bush
Attorney-Examiner

Statement Of Findings and Recommended Decision In The Discrimination Complaint Of Ronald Tapp 043-85-X0121 3-1-2249-5

COMPLAINANT:	Ronald Tapp 1834 Townsend Avenue Memphis, TN
COMPLAINANT'S REPRESENTATIVE:	Asa H. Hoke Attorney-at-Law Strick Building Memphis, TN
AGENCY:	United States Postal Service
AGENCY'S REPRESENTATIVE:	George Whitten Employee & Labor Relations U.S. Postal Service 555 South Third Street Memphis, TN 38101
COMPLAINT:	Failure to Rehire due Race Discrimination
ATTORNEY-EXAMINER:	Wendell E. Bush Equal Employment Opportunity Commission 1407 Union Ave., 5th Floor Memphis, TN 38104
DATE OF HEARING:	March 2, 1987
PLACE OF HEARING:	Memphis, Tennessee

I. INTRODUCTION

Ronald Tapp, hereinafter referred to as the Complainant, requested a hearing on his complaint that his employer, United States Postal Service, discriminated against him because of his race (white) by refusing to reinstate him to his former position.

The hearing was held on March 2, 1987 in Memphis, Tennessee. The following witnesses appeared and gave testimony:

For The Complainant:

Charles Campbell

Tommy Nix

Charles Isabel

For The Agency:

Tommy Nix

Charles Isabel

Other than the investigative file, the only document admitted into the record was portions of an inter-office memorandum to Alfred LaBarre, dated April 28, 1986.

II. PROCEDURAL BACKGROUND

Alleged Discriminatory Act...Failure to Hire Based On Race

Initial Contact with EEO Counselor.....November 11, 1984

Formal Complaint Filed.....February 25, 1985

Date of Investigation.....May 6, 1985

Notice of Proposed Disposition.....August 6, 1985

Complainant's Request For Hearing.....August 12,1985

Agency's Request For Assignment of Attorney-Examiner.....

.....September 10, 1985

III. ISSUE (S) CONSIDERED

Did the United States Postal Service refuse to reinstate Ronald Tapp to the Bulk-Mail Center because of his race (white) in violation of Title VII.

IV. FACTUAL SUMMARY AND ANALYSIS

The following facts are undisputed: Ronald Tapp was discharged in September of 1975 on grounds of alcoholism and misappropriation of government property. He had worked with the Agency as a Clerk since April of 1970. As a result of allegations of misappropriation of government property, the Complainant was arrested, placed on trial and found guilty

of violating various criminal statutes covering the fact situations involved here. Mr. Tapp was placed on three (3) years probation.

In 1981, the Complainant began to seek reinstatement with the Postal Service. He wrote several letters to William Henderson, officer in charge for the Southern Region, requesting reinstatement. He was eventually referred to Charles Isabel, Employee and Labor Relations Officer, regarding the matter. Mr. Isabel suggested that he take the Mailhandler's test so that he could have his name placed on the proper register and be drawn upon as openings come about. Mr. Tapp took and passed the Mailhandler's examination.

In June of 1984, the Complainant's name was placed on a hiring worksheet to be considered for vacancies at the Bulk Mail Center. He was called in for an interview by Tommie Nix, Employee and Labor Relations Director for the Bulk Mail Center at that time. During the interview, the Complainant told Mr. Nix about his prior discharge due to theft. Mr. Nix informed the Complainant that he would not be selected because it was the policy of the Bulk Mail Center not to rehire or reinstate employees discharged for cause, especially if it involved criminal conduct.

Evidence indicates that on four occasions the Complainant requested reinstatement. In each instance he was

denied. The dates on which he requested reinstatement are: October 16, 1981; March 12, 1982; August 10, 1983; and October 16, 1984.

At all times during the period of 1975 through 1984, the policy in the Southern Region on this issue was that employees discharged for cause and criminal conduct would not be reinstated. It was the testimony of Charles Campbell, District Director of Employee and Labor Relations for the Mid-South District, that any efforts to reinstate a employee previously discharged for cause or criminal conduct must be approved first by the Mid-South District Office (H.T. pp. 16-23).

The Complainant feels that the Agency refused to reinstate him based on race because he says that on other occasions blacks who had been discharged for theft and other criminal conduct were reinstated. Evidence indicated that in 1986, a proposal to discharge Alfred LaBarre due to theft of Agency property was proposed. However, the matter was submitted to the grievance procedure and LaBarre was only suspended for 60 days. He was not discharged. Mr. LaBarre is black. A white employee, William Heinz was disciplined in the same manner for a similar offense. The Complainant also points to a T.L. Davis (black) who was discharged in September of 1978 due to theft of government funds. He was reinstated in December of 1978. He was again terminated in

October of 1979. Mr. Campbell testified that neither this or any other employee who was reinstated after being discharged for criminal conduct was approved by his office (H.T. p. 21). The record does not reflect the fact that the Mid-South District approved the reinstatement of T.L. Davis. Record evidence indicates that no other employee discharged for criminal conduct has ever been reinstated at the Bulk Mail Center. In fact, other than T.L. Davis, there is no evidence that any other former employee discharged for cause or criminal has been reinstated by any postal facility in the Mid-South District of the Southern Region.

The burden and allocation of proof in a case such as this is three-fold. First, Complainant must establish a prima facie case. Once a prima facie case has been shown, the burden shifts to the Agency to articulate a legitimate, non-discriminatory reason for the action. If this is done, then the prima facie case of discrimination has been rebutted. Once the Agency rebuts the prima facie case, the burden shifts to the Complainant to show that the articulated non-discriminatory reasons are pretextual. Only then can a violation of Title VII be found. McDonnell-Douglas v. Green, 411 U.S. 792 (1973); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

In order to establish a prima facie case of reverse discrimination, Complainant bears the burden of showing

that the factual background and circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority race. Parker v. Baltimore and Ohio Railroad Co., 652 F. 2d 1017 (D.C. Cir. 1981); Day v. Harris, 655 F. 2d 258 (D.C. Cir. 1981). Secondly, it must be shown that the employer treated differently employees who were similarly situated but not members of the protected group in question (white). Bundy v. Jackson, 641 F. 2d 934 (D.C. Cir. 1981).

The facts do not disclose a prima facie case of reverse discrimination. First, there is no evidence of circumstances which would suggest that the Agency discriminates against white employees. No evidence regarding the number of whites hired over the last five years has been introduced. No evidence of the racial composition of the workforce has been put forth either. Nothing indicating unlawful intent on the part of the Agency to not hire white employees has been put into the record. Complainant attempts to make much of the fact that he was passed over on the hiring register on several occasions, even though he had Veteran Preference. No evidence was offered to show that blacks were being treated in a favored manner. Since racial preference was not shown, the issue is not material to the question in this case.

There is no evidence that the Agency treated black employees differently than employees who were members of

the protected group in question. The Complainant points to two instance where persons of the opposite race were treated differently. He cites first the case of T.L. Davis, a black male reinstated in December of 1978 after being discharged two months earlier for criminal conduct. After reviewing the file, the Examiner is of the opinion that T.L. Davis is not a proper comparison in this case because he is not similarly situated to the Complainant. Several facts support my conclusion: (a) first, the facts indicate that the officials in the respective cases are different. The officials charged with discrimination in this case are Charles Campbell and Charles Isabel. Neither of these individuals were involved in any manner in the T.L. Davis matter. Evidence indicates that there is some discretion on the part of the Agency officials in deciding whether the policy in question will be strictly enforced. A crucial question then is whether the same Agency official used his discretion properly at all times regardless of race. (b) There is evidence that the localities involved in these two incidents are different. T.L. Davis did not work at the same facility as Ronald Tapp. Therefore the circumstance surrounding the discharge and reinstatement of each is different. (c) Thirdly, the timeframe for each incident is different. T.L. Davis was reinstated in 1978. Ronald Tapp began seeking reinstatement at a different postal facility three (3) years later. (d) Most importantly, one isolated incident is not sufficient to show a pattern

of treating employees differently than members of the protected group. The Agency contends that the incident in 1978 was a mistake and not sanctioned by the District Office. Complainant has not shown that it was an intentional violation, or that the refusal to rehire him was done intentionally because of his race. There is no evidence of a pattern of refusing to reinstate employees based on race. Complainant points next to Alfred LaBarre, another black male who was caught stealing government property. The Examiner concludes that this individual, too, is not a comparable person. The facts indicate that LaBarre was not discharged like Ronald Tapp, rather he was put on sixty day suspension and later returned to his job.

In view of the fact that there is no proof of a prima facie case of reverse discrimination, Complainant claim of race discrimination must fail.

V. CONCLUSION AND RECOMMENDATION

Complainant has failed to establish a violation of Title VII base on race discrimination. A finding of no discrimination is recommended in the case of Ronald Tapp v. U.S. Postal Service.

SIGNATURE

Date

/S/_____
Wendell E. Bush
Attorney Examiner
Equal Employment
Opportunity Commission
Memphis District Office